Supreme Court, U. S.
FILED
APR 15 1980
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1428

A. H. ROBINS COMPANY, INC., *et al.*,

Petitioners,

v.

KALMAN ROSS and ANITA ROSS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WILLIAM E. HEGARTY
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners

Of Counsel:

CAHILL GORDON & REINDEL
JOSEPH W. MUCCIA
CHARLES A. GILMAN
JOHN C. KOUTSOS

April 15, 1980

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REPLY BRIEF FOR THE PETITIONERS

1. Respondents say to this Court that the decision below "decided no significant unsettled questions of law" (R. Br.p. 4).

Respondents said to the court of appeals, however, that their appeal raised "a matter of first impression" and "a significant issue of first impression." They said:

> "This appeal raises important and serious issues, including one issue that is a matter of first impression before any court of appeals. The decision of this appeal will have impact beyond the case at bar, and upon almost every other case filed in this Circuit and elsewhere arising under the Securities Exchange Act of 1934 ("Exchange Act"), particularly Section 10(b) and Rule 10b-5."

In discussing the court of appeals decision, counsel for respondents has recently recognized with respect to the first question presented by the Petition that the answer:

> "remains in doubt, and may so remain for some time, unless the Supreme Court should review one of these cases. Needless to say, the answer to this question will have great significance to the securities bar." *

In the court of appeals, the SEC requested permission to file out of time a brief as *amicus curiae* because "important federal securities law issues" were involved. Respondents do not refer to this fact or to the motions of the American Institute of Certified Public Accountants and five national broker-dealers to file briefs as *amici curiae* in support of the Petition.

2. The first question presented by the Petition was posed by this Court. The second question assumes *arguendo* an "implied" §10(b) remedy and addresses an issue as to which there is a direct conflict between the decision below and the decisions of four other courts of appeals. The third question addresses Congressional intent ignored by the court of appeals, but which this Court has held to be determinative.

In *Kissinger* v. *Reporters Committee for Freedom of the Press*, 100 S.Ct. 960 (1980), this Court stated:

> "This Court has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic

* Keisman, *Actions Under Various Securities Law Provisions—A Review of Express and Implied Remedies*, The Investor and the Corporation: New Developments and Tactics in Stockholder Litigation 101 (PLI April 1980).

> here.[4] Our most recent pronouncement on the subject, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), readily disposes of the question.
>
> [4] *See Touche Ross* v. *Redington*, —— U.S. ——, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)."
> (100 S.Ct. at 967-68)

In contrast, the court of appeals termed *Cannon* and *Redington* "inapposite" and not "particularly instructive" (A-16, 17), and in denying rehearing ignored *Transamerica Mortgage Advisors.**

3. Last week the General Counsel of the Securities and Exchange Commission presented a paper entitled "SEC and Private Remedies for Securities Law Violations" at a symposium sponsored by the American Law Institute and the American Bar Association concerning important recent developments in the federal securities laws. He discussed this Court's recent decisions and noted "[a] question that has arisen is whether an action for damages can be brought [under §10(b) and Rule 10b-5] even though the alleged material misstatements are also actionable under Section 18", that this question was raised but not resolved in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 211 n.31 (1976), and

* Other courts of appeals, unlike the court below, have understood this Court's teaching that legislative intent is determinative of when a private damage cause of action may be inferred from a statute not providing one. *See Jablon* v. *Dean Witter & Company*, [Current] CCH Fed.Sec.L.Rep. ¶97,296 at 97,032 (9th Cir. 1980) (refusing to imply a private damage remedy under NYSE Rule 405 or the NASD suitability rule); *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074, 1078, 1085 (5th Cir. 1980) (refusing to imply a private damage remedy under the Rehabilitation Act); *Taylor* v. *Brighton Corporation*, No. 77-3590 Slip Op. at 5-6, 13 (6th Cir. February 14, 1980) (refusing to imply a private damage remedy under the Occupational Safety and Health Act).

that in *Redington* "without resolving the issue, the Court noted that there is evidence to support the proposition that Section 18(a) was intended to provide the exclusive remedy for misstatements in reports filed with the SEC." He contrasted the decision below with other authorities cited at page 11 n.* of the Petition, including *McFarland* v. *Memorex Corporation,* No. C-79-2007 (N.D. Cal. February 12, 1980), which he stated "overrules Ninth Circuit authority (*Ellis* v. *Carter,* 291 F.2d 270 (9th Cir. 1961))." *

At this same symposium, the immediately past General Counsel of the SEC presented a paper entitled "Judicial Developments in Civil Liabilities Under the Federal Securities Laws".** He characterized the decision below as "surprising" and as expressing a "rather cavalier attitude" toward the numerous difficult problems created by the interplay of express remedies and judicially "implied" remedies, and as articulating a "surely troublesome" test for judicial implication for which the court of appeals "understandably cites no authority". He concluded:

> "One cannot help considering the 'music' of the Supreme Court's recent decisions, and particularly its suggestion that Section 10(b) was intended to play a supplemental, rather than a primary, role in the regulation

* Respondents rely (R.Br.p. 12n.*) upon *Ellis* and a number of cases which are premised upon *Ellis*. We agree with the General Counsel of the SEC that *Ellis* is no longer good law in light of recent decisions of this Court. In *Ellis* the court of appeals assumed "that Congress in 1934 undid what it carefully did in 1933" (291 F.2d at 274). Of course, this Court has found directly to the contrary. *Hochfelder,* 425 U.S. at 208-11. *A fortiori,* it can no longer be maintained that Congress intended to "undo" by implication "what it carefully did" expressly within the same Act.

** In *Cannon,* this Court cited approvingly an earlier article on "implied" rights of action by the same author, stating that "[t]he Court's decidedly different approach since 1972 to cause of action by implication has not gone without scholarly notice" (441 U.S. at 698 n.24).

> of the securities markets (*Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 203 (1976)), and wonder whether the *Ross* decision reflects a faithful application of the policies the Supreme Court has been articulating over the last four years."

4. Respondents assert (R.Br.p. 3) that there is "no concrete case for this Court."

The author of the district court decision here has, however, been constrained by the decision of the court of appeals to deny a motion to dismiss which was in substance the same motion he had granted when made by petitioners. *Abrams* v. *Johns-Manville Corporation,* [Current] CCH Fed.Sec.L. Rep. ¶ 97,305 (S.D.N.Y. 1980).

This decision, most vividly, and what respondents and the SEC said to the court of appeals about the issues presented here deny respondents' assertion to this Court.

5. Respondents also assert (R.Br.pp. 2, 17-21) that the court of appeals did not "dispense with" the requirement of reliance as an element of a § 10(b) claim or decide any issue of causation.

The court of appeals did so expressly and in just those words (A-23) and lower courts have so read the court of appeals' decision. *See Panzirer* v. *Wolf,* [Current] CCH Fed.Sec.L.Rep. ¶ 97,251 at 96,766 (S.D.N.Y. 1980).

The court of appeals premised its decision upon an expansive and clearly erroneous reading of *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972). On March 18, 1980, four days after this Petition was filed, this Court delineated the appropriate reach of *Affiliated Ute Citizens* as based upon a "duty to disclose arising from a relationship of trust and confidence". *Chiarella* v. *United States,* 48 U.S.L.W. 4250, 4252 (U.S. March 18, 1980) (reversing

the court below). The reading given *Affiliated Ute Citizens* by this Court in *Chiarella,* is that suggested in this Petition (Pet.p. 13). A writ of certiorari should issue on the second question presented since the decision below, in its interpretation of *Affiliated Ute Citizens,* conflicts with the more recent teaching of this Court as well as the holdings of other courts of appeals.

6. Respondents assert (R.Br.p. 3n.*) that "[n]either the District Court nor the Court of Appeals considered or ruled upon" the question whether Congress intended to create a private damage cause of action in favor of open-market purchasers for violations of § 10(b).

This question, of course, underlies the decision of the court of appeals that respondents "may seek to prosecute their claim under § 10(b) and Rule 10b-5" (A-24).* In point of fact, moreover, petitioners pointed out to the court of appeals this Court's limitations beginning with *Amtrak,* 414 U.S. 453 (1974), upon the "implication" of private rights of action and (in the petition for rehearing) that the court of appeals had judicially created a private damage action not intended by Congress.

7. Respondents argue (R.Br.p. 9) that this Court does not issue writs of certiorari in cases which do not have a "factual record on which to base further review."

There are no "factual" issues which need be developed here. Leave to file an amended complaint does not permit respondents to allege the reliance they have so categorically disclaimed. The questions presented are pure questions of law addressed to the complaint. They are like the questions presented in *Transamerica Mortgage Advisors, Redington, Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977),

* *Vance* v. *Terrazas,* 100 S.Ct. 540, 544 n.5 (1980).

Hochfelder, United Housing Foundation v. *Forman,* 421 U.S. 837 (1975), and *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), where this Court granted certiorari to resolve important questions of federal law which were present although the judgments reviewed were not final.

Respondents rely (R.Br.p. 9) upon decisions involving the dissimilar situations of the issuance or denial of preliminary injunctions and of interlocutory remand to the district court for findings of fact necessary for appellate review. Their description of such decisions is lifted out of context from R. Stern & E. Gressman, *Supreme Court Practice* § 4.19 at 300 (5th ed. 1978). Stern and Gressman recognize in the immediately following page that where:

> "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." (*Id.* at 301)

In support of this proposition, entirely applicable here, the authors cite: *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 153-54 (1964); *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945); *Land* v. *Dollar,* 330 U.S. 731, 734 n.2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 685 n.3 (1949); *Hanover Star Milling Co.* v. *Metcalf,* 240 U.S. 403, 408-09 (1916); *Forsyth* v. *Hammond,* 166 U.S. 506, 514-15 (1897); *American Construction Co.* v. *Jacksonville, T. & R.R. Co.,* 148 U.S. 372, 387-88 (1893).

Respondents' reliance (R.Br.p. 10) upon cases involving "advisory opinions", *United States* v. *Freuhauf,* 365 U.S. 146 (1961), *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227 (1937), or "ripeness" or "justiciability" in the context

of a constitutional challenge, *International Longshoremen's and Warehousemen's Union, Local 37* v. *Boyd,* 347 U.S. 222 (1954), *Rescue Army* v. *Municipal Court of City of Los Angeles,* 331 U.S. 549 (1947), is misplaced. Respondents take these citations from L. Tribe, *American Constitutional Law* 53-62 (1978), where the author discusses federal judicial power in the context of constitutional questions. However:

> "As long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for certiorari filed, the Supreme Court has jurisdiction to take the case whatever its status in the lower courts. *The Conqueror,* 166 U.S. 110, 113." R. Stern & E. Gressman, *Supreme Court Practice* § 2.2 at 53 (5th ed. 1978).

Respondents, again parrotting from Tribe's discussion of justiciability, *supra,* at 58, characterize the questions presented as "abstract" and "hypothetical". They are not. The questions presented raise important and clear-cut issues of law that are fundamental to the further conduct of the case. The only "factual record" (R.Br.p. 9) necessary to a determination of the questions presented is the amended complaint (Appendix F to the Petition) and the law. The court of appeals described the former, but ignored the latter.

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On seven occasions since 1975 this Court has reversed or overruled the court of appeals for the Second Circuit in cases arising under the federal securities laws.* In this

* *Chiarella, Transamerica Mortgage Advisors* (overruling *Abrahamson* v. *Fleschner,* 568 F.2d 862 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978)), *Redington, Burks* v. *Lasker,* 441 U.S. 471 (1979); *Sante Fe Industries, Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1 (1977); *United Housing Foundation.*

case the court of appeals again determined to chart its own course, choosing to characterize decisions of this Court as "inapposite" or not "particularly instructive" or by ignoring them altogether. The decision below demands review by this Court.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

William E. Hegarty
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners

Of Counsel:

Cahill Gordon & Reindel
Joseph W. Muccia
Charles A. Gilman
John C. Koutsos

April 15, 1980

APPENDIX

79-7106

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of March, one thousand nine hundred and eighty.

KALMAN ROSS and ANITA ROSS,

Plaintiffs-Appellants,

v.

A.H. ROBINS COMPANY, INC., E. CLAIRBORNE ROBINS, WILLIAM I. ZIMMER, III, E. CLAIRBORNE ROBINS, JR., GEORGE E. THOMAS, KENNETH L. ROBERTS, CHARLES E. SALTZMAN and STUART SHUMATE,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion filed December 21, 1979 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) F.R.A.P. be and it hereby is granted.

/s/ WALTER R. MANSFIELD
Walter R. Mansfield, U.S.C.J.

/s/ JACOB MISHLER
Jacob Mishler, U.S.D.J. (per WRM)

Circuit Judges